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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ~~[illegible]~~ 26

THE PHŒNIX BRIDGE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 19, 1907.

(20,583.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 618.

THE PHŒNIX BRIDGE COMPANY, APPELLANT,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 21, 1907.

1 I.—*Petition. Filed June* 12, 1897.

In the Court of Claims of the United States.

No. 20804.

THE PHŒNIX BRIDGE COMPANY
vs.
THE UNITED STATES.

Petition. Filed June 12, 1897. *J. R.*

To the Honorable the Judges of the United States Court of Claims:

The petition of the Phœnix Bridge Company respectfully shows as follows:

1. Your petitioner is a corporation, duly created under the laws of the State of Pennsylvania, for the purpose of manufacturing articles of iron and steel and of building bridges and all kinds of structural work of metal or wood, or both, now having its principal office in the city of Philadelphia, in said State, and that it has at all times borne true faith and allegiance to the Government of the United States, and has not in any way aided or abetted or given encouragement to rebellion against the said Government.

2. In response to a circular advertisement received from the defendant, signed by A. R. Buffington, as colonel of ordnance,
2 commanding the Rock Island arsenal, inviting proposals for the erection of a new superstructure and for an alteration of the abutments and piers of the United States bridge over the Mississippi river betwixt Davenport, Iowa, and Rock Island, Illinois, your petitioner, upon the 12th of August, 1895, submitted a proposal, which having been accepted, a contract in writing for said work was, upon the 2d of October, 1895, duly entered into and signed by your petitioner and the defendant, the latter being represented therein by the said A. R. Buffington, who at the same time, in his above official character, was also placed in general supervision and control of its execution, and so remained until the work was completed.

3. Whilst engaged in such execution, on the 25th day of February, 1896, your petitioner had progressed so far with the erection of the trusses of the draw-span for said bridge that all the false work or piling for the same as well as for carrying the railway bridge had been driven to the bed of the river, and one of the metal arms of said span had been partly erected on such false work.

4. At said last-mentioned date a rise occurred in said river, by which large masses of ice, previously formed and accumulated therein, were displaced and forced against said false work, causing the same to give away, and, together with the metal superstructure aforesaid, to be precipitated into the stream, thereby interrupting traffic over the bridge and occasioning great loss to your petitioner.

5. Inasmuch as by said contract it was required to do the work

without interfering with the ordinary running of trains over the bridge, your petitioner at once set about the repair of such damage, and within one week after it had occurred had replaced the false work in question, laid new rails thereon, and restored the running of trains.

3 6. Thereupon the said A. R. Buffington, acting therein on behalf of the United States, in his official character as above described, ordered your petitioner to put in place a temporary lift-span in substitution for the false work then as aforesaid in process of restoration, such lift-span to be rested upon temporary supports near the piers of the bridge, so as to leave an unobstructed waterway beneath, and to be so adjusted that it might be raised for the passage of vessels and also lowered again for the running of trains during the construction of the permanent draw-span, which latter he then also ordered to be erected upon false work extending up and down stream, the whole purpose of said proposed lift-span having been, as your petitioner avers, to protect and maintain the navigation of the river in case the season for this should return prior to the completion of the draw-span, so that there should be no obstruction thereof by false work or piling standing in the channel; and your petitioner thereupon forthwith protested against the said order upon the ground that the work in question was not within its contract, either expressly or by implication, so that it was no part of its duty thereunder to maintain such navigation.

7. Notwithstanding such protest, the said A. R. Buffington insisted upon a compliance with his order and offered to aid therein by supplying an old span, which in that connection he had obtained from the Chicago, Rock Island and Pacific Railway Company, and which had been delivered by the latter at the site of the bridge. Upon this state of things, after due consideration of all the circumstances, and under an apprehension that a refusal might jeopardize regular payment of estimates under its contract, your petitioner agreed to comply with such order, and so notified Colonel Buffington, expressly persisting, however, in its protest that the work was not included in its contract, and also understanding that it would be paid for by the United States independently thereof.

4 8. Thereupon your petitioner removed the false work replaced as above for the erection of the draw-span and restoration of the railway traffic and put in place and maintained in operation the said lift-span under the instructions of the said A. R. Buffington as to all details and with his approval, keeping the same in service until the new metal draw-span was completed, when it was taken down and returned by your petitioner to the point at which it had been received, the entire work in that connection being completed by the first day of June, 1896.

9. Your petitioner shows that there is therefore justly due to it from the United States the sum of six thousand nine hundred and fifty-eight and 14/100 ($6,958.14) dollars, as set forth in the following statement of particulars:

To cost of erection and removal of temporary lift-span for main-

tenance of navigation on the Mississippi river during the erection of the Rock Island bridge (March 1 to June 1, 1896), viz:

Labor, erecting and removing towers and spans, as per pay-rolls on file	$2,956 87	
Labor furnished by Chicago, Rock Island and Pacific Railway Company as per bill on file	96 29	
Labor, loading hoisting engines at Sioux City, as per bill of Sooysmith & Co.	15 40	
		$3,068 56
Coal for hoisting engines	$105 60	
Timbers for towers	997 26	
Special metal hoisting blocks and cables	539 55	
Spikes, bolts, etc.	143 85	
Forgings made by United States Government and paid for by Phœnix Bridge Company	154 15	
5 Freight on timber and hoisting engines	$300 26	
Rent for use of hoisting engines	375 65	
Cost of accident to workman	118 45	
Steamboat hire	35 00	
Miscellaneous expenses	38 25	
		2,807 02
General superintendency and office expense		200 00
Deterioration and loss of tools		250 00
		$6,325 58
Plus 10 per cent., customary allowance as profit		632 56
		$6,958 14

10. That no assignment or transfer of said claim or any part thereof or interest therein has ever been made, and that your petitioner is justly entitled to the amount above stated, after allowing all just credits and offsets.

Wherefore your petitioner prays judgment against the United States for the sum of six thousand nine hundred and fifty-eight and 14/100 ($6,958.14) dollars.

THE PHŒNIX BRIDGE CO.,
Per DAVID REEVES, [SEAL.]
President.

Attest:
GEO. PERRY WHITE,
Secretary.

WM. H. ALBURGER, JR.
F. T. DAVIS.

STATE OF PENNSYLVANIA, *City of Philadelphia, ss:*

I, David Reeves, being first duly sworn, do depose and say that I am the president of the Phœnix Bridge Company, a corporation, which corporation is named as party claimant in the annexed petition. I have read the said petition and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information, and belief.

DAVID REEVES.

Subscribed and sworn to before me this 9th day of June, A. D. 1897.

JOHN RODGERS,
Notary Public.

[SEAL.]

PHILLIPS & McKENNEY,
Attorneys for Claimant.

II.—*Traverse. Filed March* 12, 1903.

In the Court of Claims of the United States, December Term, A. D. 1906.

No. 20804.

THE PHŒNIX BRIDGE COMPANY
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

III.—*Argument and Submission of Case.*

On the 12th day of March, 1903, this cause was argued by Mr. John S. Flannery for the claimant and by Mr. William H. Button for the defendants and submitted.

IV.—*Substituted Amended Findings of Fact, Conclusion of Law, and Opinion of the Court.*

THE PHŒNIX BRIDGE COMPANY
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The Claimant, the Phœnix Bridge Company, is a corporation duly created and existing under the laws of the State of Pennsylvania, having an office and place of business in the city of Philadelphia, in that State, and is engaged in the business of constructing bridges of metal and wood and manufacturing the materials necessarily entering into the same. Said claimant has at all times yielded true faith and allegiance to the United States, and is the true owner of the claim herein sued on, never having assigned or transferred the same or any interest therein to any person or persons.

II.

On July 5, 1895, the Government of the United States issued a circular advertisement, signed by A. R. Buffington, colonel of ordnance, U. S. Army, inviting proposals for the construction of a new superstructure and making alterations in the abutments and piers of the Government bridge over the Mississippi River, connecting Davenport, Iowa, and Rock Island, Ill.

This advertisement called for proposals for the furnishing of about 900 cubic yards of masonry for the abutments and piers and for the construction of a new metal superstructure, consisting of eight spans, including one drawspan.

The claimant submitted a formal proposal, and in addition thereto addressed a letter to Colonel Buffington, dated August 10, 1895, in the words and figures following:

"PHŒNIXVILLE, PA., *August 10th*, '95.

"Col. A. R. Buffington, Col. Ord., Commanding Rock Island Arsenal, Rock Island, Ill.

DEAR SIR: Appreciating the importance of finishing the proposed new bridge at Rock Island at the earliest possible date, we have been making a very careful study of the best method of removing the present structure and erecting the new spans, and have finally decided upon a plan which will enable us to work on the structure regardless of floods and ice in the river, and thereby give you the work at least five or six months before the time mentioned in your letter of July 27th. Our plan of erection is shown in detail on prints 1 and 2 sent herewith.

"The erection of the drawspan of course must be done during the closing of navigation, between the 20th of November and the 15th of March of the following year, and this span will be removed in the ordinary manner, by placing false work in the river to support temporarily the old structure and the railway traffic during the removal of the present span, and for supporting the new work during erection, the various parts being put in position by the ordinary overhead traveler shown on plan 2. This particular part of the erection does not need any special explanation. As we have made a specialty of draw-

span work and have every facility in our shops for building such a span, we have named a date of completion for the new drawspan of March 1st, 1896. The first small span, 'E,' we will erect in advance of the drawspan, and will have same in position on Feb. 1st, 1896. We erect this small span in advance of the draw that we may bring these two spans up to the new grade together.

"The method we have adopted for removing the old and raising the new river spans is shown in detail on plan 1 and is explained in its general features by note at the upper right-hand corner of this print. The essential feature is this: We abandon highway traffic, thereby reducing the live load on present structure by at least 2,400 lbs. per lin. ft., remove the sidewalks and planking and other portions of the work as far as possible, making a total reduced load on old span of at least 3,000 lbs. per lin. ft. We are thereby enabled to support the new trusses from the old span, as they will not exceed this weight. It is needless to enumerate the various stages of this erection, as it is clearly noted on print. This plan enables us to work independently of the river and is of great advantage.

"Regarding the repairs to masonry, we propose to jack up the present structure and enable masons to do their work in advance of the raising of the new work, so that when we arrive on the ground with the new iron, all these masonry repairs will be completed. We could start this part of the work at any time.

"We have not been asked to name a price for the old material removed, but are prepared to give you figures at any date you agree to receive same.

"We shall be glad to further explain our proposed method of erection and the modified plans of the new structure presented, in person, at any time.

"Hoping that we may be favored with your order for this work, as we have a very special interest in the old Rock Island bridge, having built the old structure as well as made the recent repairs, and assuring you that if the order is placed with us it will have our very best attention,

"We remain, yours, tru'y,

"(S'g'd) JNO. STERLING DEANS,
"Chief Engineer.

"P. S.—Referring to our bid for masonry, please note that it is in accordance with spec. Granite bridge seats and the balance
11 Anamosa stone. If Kettle river or Bedford would be satisfactory to you for bridge seats our price could be reduced to
$21.75 p'r yd. for foundation in place.

"(S'g'd) PHŒNIX BRIDGE CO."

On August 13 and again on the 16th the claimant was notified, in writing, of the acceptance of its proposal, such notification stating, however, that decision upon the character of the stone to be used and the form of the solid steel railroad floor was reserved. Some delay occurred in reaching a decision in reference to this stone work and flooring, and it was not until October 2, 1895, that the contract was finally executed between the claimant and the United States.

In the execution of the contract, and thereafter in the supervision of its performance until the end, the United States was represented locally by A. R. Buffington, colonel of ordnance, U. S. Army. The contract was duly approved by D. W. Flagler, brigadier-general, Chief of Ordnance, acting under the direction and by the authority of the Secretary of War.

The portions of said contract material to be considered here are as follows:

"1st. * * *

"Under advertisement dated July 5th, 1895, the said party of the first part does hereby contract and engage with the said United States to furnish all the labor and material required for renewing the superstructure of the Rock Island bridge, at Rock Island, Illinois, including alterations of the masonry thereof and repairs thereto for a double track, and to do and perform all the said work in accordance with the plans furnished by the United States, and subject to all the conditions, stipulations, and requirements of said advertisement, the specifications and drawings issued thereunder, and the supplementary specifications for a solid steel floor for railway deck, and plan shown in blue print marked 'Proposed section of flooring for Rock Island bridge,' copies of all of which are hereto attached and form part of this contract."

* * * * * * *

"The price to be paid for the work herein contracted for is as follows:

"For renewing the superstructure, including the steel floor, finished in place, including the cost of removal of the old superstructure, three and ninety-four one-hundredths cents ($0.03 94/100) per pound.

"For alteration of the masonry in the piers, including removal of the old masonry, excavations, and additional foundations, twenty-one dollars and seventy-five cents ($21.75) per cubic yard.

"The work to be completed within the time specified in the proposal of the party of the first part under the advertisement of July 5, 1895."

"3d. The said party of the first part shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the work herein contracted for."

"5th. If any default shall be made by the party of the first part in delivering all or any of the work mentioned in this contract, of the quality and at the times and places herein specified, then in that case the said party of the second part may supply the deficiency by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said
12 party of the first part shall be charged with the expense resulting from such failure. Nothing contained in this stipulation shall be construed to prevent the chief of ordnance, at his option, upon the happening of any such default, from declaring this contract to be thereafter null and void, without affecting the right of

the United States to recover for defaults which may have occurred; but in case of overwhelming and unforeseen accident, by fire or otherwise, the circumstances shall be taken into equitable consideration by the United States before claiming forfeiture for nondelivery at the time specified."

The specifications forming a part of said contract contained, among other things, the following material provisions:

"II.—*Plans.*

"4. General plans and strain sheets will be furnished to the contractor, from which he shall prepare, free of charge, full working drawings and submit them to the commanding officer, Rock Island arsenal, for approval, before ordering material.

"7. The contractor shall make all changes in the plans ordered by the commanding officer, Rock Island arsenal, after the contract has been awarded. Such changes shall be made free of charge, unless they involve the rejection of material already ordered or manufactured. In case such changes involve a delay, the contractor shall be allowed a corresponding extension of time."

"VIII.—*General Shop Requirements.*

"36. The work shall be done in all respects according to the plans and specifications furnished or approved by the commanding officer, Rock Island Arsenal."

"XX.—*Erection.*

"141. The contractor will be required to furnish all tools, barges, and false work of every description.

"142. The contractor shall remove all temporary work which he may put in the river, so that there will be nothing left to interfere with the navigation or to catch drift. This temporary work shall be removed as soon as possible after its duty is done.

"143. The contractor will be required to perform the work in such a manner as not to interfere with the running of the trains over the bridge. One track will be used until the erection is completed. The contractor will be required to keep this track continually open and safely supported, so as not to delay the trains.

"148. The contractor will be required to remove the old superstructure, without disturbing the trains, and to erect the new superstructure complete in every respect, including riveting, ready to receive the ties for the railway floor, the wooden roadway, and the moving machinery of the draw. He will be required to give the whole superstructure a coat of pure iron-oxide paint and boiled linseed oil after erection.

"149. The grade of the railroad floor on the new bridge will be about two feet higher than the present grade. The contractor will be required to effect this change of grade in a manner not to disturb the trains or introduce heavy inclines.

13 "152. There shall be no traffic on the roadway floor during erection which will interfere with the erection, but the contractor shall so manage the work as to require a closing of the roadway floor for as short a period as the requirements of a proper performance of the work will permit, and the commanding officer is to be the judge of this; and if, for any reason, work is suspended for a sufficiently long period, the commanding officer may require the contractor to provide for such temporary use of the roadway as is reasonable and practicable."

"XXI.—*Terms.*

"155. The superstructure will be paid for by the pound of finished work erected complete, and accepted by the engineer in charge and the commanding officer Rock Island Arsenal. The price per pound of new work will include the removing of the old superstructure and depositing it on cars, or otherwise, as may be agreed upon.

"156. No material will be paid for which does not form a part of the permanent finished structure.

"157. The contractor will be required to perform all work and furnish all tools, machinery, and everything necessary to remove the old structure as far as indicated, and build the new structure complete, except timber floors and rails and except moving machinery for draw. The price per cubic yard of new masonry and per pound of iron and steel erected must cover the total cost. No extras of whatsoever kind or nature will be allowed.

"159. The several spans shall be completed and erected on or before the following days:

	Complete for shipment.	Erected.
"A" drawspan.	December 1, 1895	January 1, 1896
* * *	* * *	* * *
"D"	October 1, 1896	November 1, 1906

"The dates given above are of the essence of the contract, and no payment will be made for any work or material, as provided by these specifications and the contract, to be made with the contractor while he is in arrears in delivery or erection, and in case of the failure of the contractor to have the work completed by November 1, 1896, he will be required to pay two hundred dollars ($200) per day as liquidated damages in consequence of such delay."

III.

The specifications, as originally prepared, called for the erection of the drawspan by January 1, 1896, and the completion of the bridge on November 1, 1896. Subsequently, the specifications were modified so as to fix March 1, 1896, as the date for the erection of the drawspan, and September 15, 1896, for the final completion of the whole bridge.

IV.

On February 25, 1896, a sudden breaking up and movement of the winter ice in the Mississippi River at the point in question took place, by which the drawspan, so far as it was then constructed, was destroyed.

14 V.

On the 26th of February, 1896, while the claimant was about to resume work upon the drawspan, in accordance with the terms of its contract, and had begun to replace the false work in the river, Colonel Buffington ordered it to desist and employ a "*liftspan,*" so that there would be no obstruction to navigation should it open before the work of reconstructing the drawspan had been completed.

This "liftspan" was a temporary span running from the drawrest to the first finished span, supported at each end by ropes attached to wooden towers, and was raised and lowered by means of a stationary engine to admit the passage of boats and trains.

VI.

The claimant objected to the order of Colonel Buffington upon the ground that it was not warranted by the contract, and by complying therewith claimant would be subjected to great expense.

VII.

In carrying out the order of the Government officers and thus reconstructing the drawspan by the lift-span method, the claimant was put to an expense beyond what it would have been compelled to incur if the drawspan had been reconstructed in the manner provided by its contract of $6,683.59.

VIII.

Colonel Buffington's order was intended to meet an exigency caused by the imminence of an immediate opening of navigation, and to avoid the consequent large damage which would have been done to the shipping of the river and the property interests employed therein by the obstruction which would have been caused by work under the contract if navigation had opened about March 1, as might have been apprehended upon February 26.

IX.

The bridge so provided to be renewed by the plaintiff extended between Rock Island, Ill., and Davenport, Iowa. At the Rock Island end of the bridge there was a stationary span, and next to that there was a drawspan, and beyond that there were several more stationary spans extending to the Iowa end of the bridge. The drawspan was intended for the convenience of navigation upon the river, and said draw was the only means that vessels and other craft on the river had of going from one side of the bridge to the other. The object of fixing March 1, 1896, for the completion of the drawspan was that navigation, which was likely to open at that place in the middle of March, should not be interrupted by the work of construction upon the

bridge. This object was well understood by both parties to the contract.

The plan adopted for the erection of the bridge contemplated the substitution of new material for the old superstructure without interruption to the railroad traffic over the bridge, and the scheme adopted was to carry such traffic upon false work, consisting of timbers extending from the bed of the stream to the old superstructure, for the purpose of supporting the tracks for such traffic. This false work under the drawspan made a barrier across that portion of the stream which would have rendered navigation impossible in case such false work were not removed prior to the opening of navigation.

X.

The claimant proceeded to fulfill the obligations of its contract, and erected the necessary false work, including that for the drawspan, and was proceeding with the erection of the drawspan itself on February 25, 1896, when, as a result of a rise in temperature, the ice in the river at that point moved, taking with it the false work and a substantial portion of the drawspan then in place. In the condition in which the work was at that time nothing could have been done to prevent the destruction of the work. In case the accident had not happened, the drawspan would have been completed by March 15, 1896, to such an extent that it could have been swung so as not to impede navigation. The claimant did not proceed with the erection of the drawspan as expeditiously as it might have done, particularly in that it did not procure the necessary material in the order necessary for erection of the drawspan. Said span might have been completed a considerable time before February 25, 1896, although the claimant was not bound to have it completed until March 1, 1896, by its contract. The United States was in no way responsible for any delays in the fulfillment of said contract, and was in no wise in default.

XI.

After said accident Col. A. R. Buffington, United States ordnance officer in charge of the construction, together with several of his assistants, had a conference with the representatives of the claimant at the site of the bridge, and it was determined that the most feasible way of reparing the damage and going on with the construction of the drawspan was to erect said span upon the pivot pier running up and down the river, so that the erection of said drawspan should not interfere with navigation, which was likely to open at any time after March 1. It was further determined that the most feasible way of providing for railroad traffic during the erection of said draw span was to put in place a temporary lift span, which could be so operated as to allow the passage of vessels. Thereupon Colonel Buffington ordered the claimant to erect such lift span, which the claimant did at the expense of $6,683.59.

XII.

At the time of the conference mentioned in the last finding the representatives of the claimant demurred to the erection of such lift

span. They claimed that the claimant could proceed to repair the damage done by the accident and erect the draw span on false work across the channel of the river prior to the opening of navigation. Colonel Buffington and his assistants maintained that this could not be done.

16 XIII.

Navigation opened in the season of 1896 on March 27. At the time of the accident it could not have been foreseen that navigation would not open several weeks prior to that date. Navigation on the river at this point is heavy and continuous from the opening of navigation. In case navigation had been interrupted up to the date when the draw span could have been ready to swing, the damage to persons engaged in such navigation would have been greater than the expense of the erection and operation of such lift span.

XIV.

The lift span was furnished to the claimants, and was erected by them under the instructions of the engineers of the United States, and maintained until June 1, 1896. The cost of the erection and maintenance of said lift span was $6,683.59. The erection of the lift span was necessary in order to provide for railroad traffic and the navigation on the river, and was the most feasible and the least expensive method of so doing.

XV.

After the accident on February 25, 1896, the claimant proceeded to erect the draw span, in accordance with the contract, and said draw span was ready to swing June 1, 1896.

XVI.

Upon the completion of the contract the claimant signed the following instrument and received the payment therein mentioned:

DEFENDANT'S EXHIBIT NO. 8—F. W. B.

The receipt on the attached voucher for the last payment, viz, of twelve thousand nine hundred and thirty-five dollars and forty cents ($12,935.40), for the new superstructure and work of erection of same, and alterations and additions to the abutments and piers of the Rock Island Bridge between the "Rock" Island and the city of Davenport, Iowa, under the contract with the United States dated October 2nd, 1895, is hereby acknowledged as the final and full payment for all the material furnished and for all the work performed under the said contract, and in full for all charges, claims, adjustments, differences, or other alleged indebtedness incident to the work or related to it in any manner whatever.

THE PHŒNIX BRIDGE CO.,
By A. C. STITES, *Res. Eng.*

Rock Island Arsenal, Illinois, December 11th, 1896.
(Triplicate.)

17 Form No. 17*bbb*.

To be used only in payment for labor under contract.

The United States to the Phœnix Bridge Co., Phœnixville, Pa., Dr.

Date of purchase.	Appropriation: Reconstructing Rock Island bridge.		Amount.	Remarks showing the objects of the purchase or expenditure.
1896. Dec. 11	For steel furnished for reconstructing Rock Island bridge, viz., 10,204,534 lbs., erected complete, at $0.0394 per lb.		$402,058.63	
	Deduct previous payments for steel.....		389,123.23	
	See vouchers of R. I. Arsenal cash account, as follows:			
	No. 551, Dec., 1895.....	$7,422.21		
	2, Jan'y, 1896.....	50,529.78		
	77, Febr'y, 1896.....	45,130.21		
	111, Mar., 1896.....	54,567.72		Reconstructing Rock Island bridge.
	153, April, 1896.....	50,158.09		
	185, May, 1896.....	31,139.54		
	218, June, 1896.....	34,171.03		
	325, Oct., 1896.....	85,405.15		
	365, Nov., 1896.....	10,393.50		
		389,123.23		
			12,935.40	

Final payment. Contract completed.
Under formal written contract dated October 2nd, 1895.

I certify that A. C. Stites is the res. engr. of the Phœnix Bridge Co., and is known to me to be duly authorized to receive and receipt for moneys due said company.

(Signed) A. H. RUSSELL,
Captain of Ordnance, U. S. Army.

At the time of signing this paper the claimant made no protest and understood that it covered all claims it had against the United States growing out of the erection of said bridge. The final completion of the work provided for in the contract was several months later than the time limited in said contract, and at the time said instrument was presented to plaintiff's agent for his signature he objected to signing it. Buffington then informed him if he did not so sign it as a final release of all claims, his instructions were to refer the whole matter, including claims for delay in the completion of the work, to the Department. Claimant's agent then advised directly with his principal, after which he signed the instrument and received the final payment, and at the same time, in reply to an inquiry by Colonel Buffington whether he signed without reservation, replied, "You have our signature to the release as you handed it to me." Before this time there had been dispute between the parties, both as to the liability of defendant for the lift span and the plaintiff for delay in the completion of the work. No damages for delay were afterwards claimed or sought to be enforced against the claimant.

Conclusion of Law.

Upon the foregoing findings of fact the court decides the claimant can not recover, and its petition should be dismissed.

18 WRIGHT, J., delivered the opinion of the court:

By its contract with the defendant the plaintiff had obligated itself to construct a new bridge over the Mississippi River between Rock Island, Ill., and Davenport, Iowa, with one drawspan for the use of navigation upon the river, this latter to have been completed March 1, 1896, in order that river navigation might not be interrupted by the work of constructing the bridge, it being then understood by the parties that river navigation would open between that date and the 1st of April following, and the intention of the parties was to provide for and accommodate that event. During the winter the river was frozen, and February 26, 1896, as the result of a thaw, the movement of ice in the river at this point caused the destruction of the incompleted drawspan; and to prevent interference with navigation, with the advice of defendant's officers, plaintiff erected a temporary lift span, to be operated upon the bridge, for the accommodation of railroad traffic and river navigation until the permanent drawspan could be reconstructed. This suit is to recover for the cost of the construction of the lift span.

There is dispute in the several contentions of the parties relative to their respective liabilities for the cost of the temporary span made necessary by the action of the ice in the river upon the incompleted bridge. It is not denied that it was beyond the power of petitioner to reconstruct a permanent drawspan in time to accommodate the opening of river navigation, nor that the erection of the lift span was the most feasible and inexpensive way to meet the necessities of the public in that regard. After the destruction of the incompleted drawspan the military officer in charge, upon consultation with his subordinates, determined that the lift span should be constructed, and so advised the representatives of the petitioner, which the latter now construes as an order of that officer, but whether advice merely or an order, we deem unimportant, for if the latter, petitioner was under no obligation, except to fulfill the terms of its contract, and the officer possessed no power over the claimant, or authority to represent the defendant, except also as provided in the terms of the contract itself, and there can be no just claim that it gives sanction to such order of that officer, or power to vary the terms stipulated therein for his principal, except such as relate to change of plans merely. Hence the case clears itself, and is to be settled exclusively by the contract as made by the parties. It is not disputed that by the stipulation of the contract the draw span was to be completed March 1, or if the contention of plaintiff is to be admitted, the time was extended to March 15, and for this purpose it would be immaterial which date should be adopted, for the fact remains that the drawspan was not completed before March 15, and in order not to obstruct river navigation, and at the same time accommodate railroad traffic,

as contemplated by the contract, it was necessary to construct the temporary lift span. Without the fault of the defendant, plaintiff was, by an unforeseen event, rendered powerless to perform its contract within the time stipulated and it was met by the contingency of subjecting itself to the consequences of interrupting river navigation incident to its inability to perform, and the incurrence of such damages to the defendant and the public as might result from such interruption, or assume the burden of providing a temporary means of avoiding the obstruction of the river, and it chose the latter
19 alternative. In any aspect of the case in which it may be presented, we are of the opinion that by the contract of the plaintiff it assumed the burden of this accident, if it may be thus characterized. It has been argued, to unburden itself of this liability, that the ice flow was the act of God, and thereby the contract was rendered impossible of performance. It can not be denied that the ice flow was the act of God, and by reason thereof the contract could not be performed, but counsel for plaintiff are mistaken in their application of the law in such cases, when it is claimed the bridge company was excused from performance because of the act of God, where the event which caused the impossibility of performance might have been anticipated and guarded against in the contract. The event of a frozen river and its incident of ice gorges is of common observation in the locality of this contract, and might well have been anticipated by the parties. It is, we think, in such cases, elementary law, needing no authority in support of it, that if a party contract to perform anything which is possible at the time when the contract is made, but afterwards becomes an impossibility, he is liable in damages resulting from nonperformance thereof. The distinction is that if an obligation be imposed by law, and does not arise from his contract, if it be rendered impossible afterwards by the act of God, or by the act of the Government, he will be excused for nonperformance. In the case presented the obligation does arise from the contract of the party, and does not therefore fall within the exception of things rendered impossible by the act of God. The rule is that if a person desires exemption from such acts it must be so provided in the contract (Story on Contracts, sec. 975; Chitty *id.*, 1074), and there is no pretense that such was done in the present case.

After the bridge was completed, the voucher for the final payment was sent by the Department to the Military officer in charge at Rock Island, who was required by his superiors to insist upon a stipulation in the receipt to be executed by the plaintiff to the effect that the payment therein designated should be in full for all charges, claims, adjustments, differences, or other alleged indebtedness incident to the work or related to it in any manner whatsoever, thereby clearly evincing an intention to include the claim in question. Previous to this time the representatives of the plaintiff had been insisting upon a claim for compensation from the Government for the construction of the lift span, which had been denied and resisted by the officers of the defendant and a counterclaim against claimant insisted upon for delay in the work. There was at least honest dispute and differences between the parties in this regard. Plaintiff's rep-

resentative objected to the execution of the document in the form insisted upon, but was informed by the officer unless he did so the instructions from Washington were that all matters in dispute should be referred to the Department for adjustment. The person in charge of the business for the plaintiff advised directly with his principal relative to the matter, after which, to enable the plaintiff to gain immediate use of the final payment of twelve thousand nine hundred and thirty-five dollars and forty cents ($12,935.40), he executed the voucher as required, and in the form and substance we have recited, and payment was made accordingly. No protest could be continued as effective under the circumstances, for by signing the re-
20 lease and accepting payment without first returning the money so obtained, such protest was abandoned, and hence petitioner's reliance upon a protest, if one existed, is futile. It has been often held by courts of highest resort, and is familiar law, that the compromise of honest disputes or differences of the parties, forms a good consideration for the discharge of all supposed liabilities growing out of them, and that a release or discharge so obtained and given is valid and binding upon the party who executes it. No undue advantage was taken of the plaintiff; it was free to accept or reject the payment upon the terms proposed, and it saw fit to choose the former, and it must be held to abide by the effect of its own voluntary act.

It results from our expressed views that plaintiff cannot recover, and its petition will therefore be dismissed.

BY THE COURT.

March 30, 1903.

21 V.—*Judgment of the Court.*

No. 20804.

THE PHŒNIX BRIDGE COMPANY
vs.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 30th day of March 1903 judgment was ordered to be entered as follows: The Court on due consideration of the premises find for the defendants and do order, adjudge and decree that the petition of the claimant, The Phœnix Bridge Company, be and the same is hereby dismissed.

BY THE COURT.

22 VI.—*Motion to Amend Findings and also Application for Appeal.*

On the 16th day of May 1903 the counsel for the claimant filed a motion to correct and amend the findings of fact filed by the Court.

On the 20th day of June 1903 the claimant filed an application

for the allowance of appeal to the Supreme Court of the United States, to wit:

No. 20804.

THE PHŒNIX BRIDGE COMPANY
vs.
THE UNITED STATES.

From the judgment rendered in the above-entitled cause on the 30th day of March, A. D. 1903 in favor of the defendant, the claimant, by its attorneys on the 20th day of June, A. D. 1903 makes application for, and gives notice of an appeal to the Supreme Court of the United States.

F. D. McKENNEY,
J. S. FLANNERY,
Attorneys for Claimant.

Filed June 20, 1903.

23 VII.—*Order of Court. Filed January* 4, 1904.

On the 4th day of January 1904, the Court filed an order sustaining in part claimant's motion to amend findings of fact and overruled it in part, and that the findings of fact as so amended stand as the findings of the Court.

BY THE COURT.

24 VIII.—*Appeal, Filed June* 20, 1903, *Allowed.*

On the 7th of January 1907 the claimant by *his* attorneys, moved in open court that the application for an appeal filed June 20, 1903, be allowed and it was thereupon ordered that said appeal be allowed as prayed for.

BY THE COURT.

25 IX.—*Certificate.*

No. 20804.

THE PHŒNIX BRIDGE COMPANY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the judgment of the Court; of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 15th day of February, 1907.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 20,583. Court of Claims. Term No. 618. The Phœnix Bridge Company, appellant, *vs.* The United States. Filed February 19th, 1907. File No. 20,583.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 26.

PHŒNIX BRIDGE COMPANY, APPELLANT,

vs.

UNITED STATES.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Court of Claims dismissing the petition of the Phœnix Bridge Company in an action to recover from the United States on an implied contract, the sum of $6,683.59, which was the cost and expense of erecting and maintaining a certain lift-span in the Government bridge over the Mississippi River between Rock Island, Illinois, and Davenport, Iowa.

STATEMENT OF FACTS.

The facts as found by the Court of Claims are in substance as follows:

On the 2d of October, 1895, the United States entered into a contract with said company (a Pennsylvania corporation engaged in the construction of bridges of metal and wood), for the erection of a new steel railroad draw-bridge over the Mississippi River between Rock Island, Illinois, and

Davenport, Iowa, the same to be erected in accordance with plans and specifications prepared by the United States, and for a stipulated price per pound of erected superstructure and per cubic yard of masonry substructure. The plans called for a bridge composed of a number of stationary spans and one draw-span, the latter intended for the convenience of navigation upon the river. The specifications required the substitution of the new superstructure for the old without interruption of railroad and highway traffic over the bridge, and this was to be accomplished by building false work consisting of timbers extending from the bed of the stream to the floor of the old superstructure, thus supporting the tracks and floor for such traffic. This false work so long as it remained in the river necessarily made a barrier across the stream which rendered navigation thereof impossible.

The contract contained numerous provisions making it the duty of the company to protect the railroad and highway traffic, but contained no provision obligating it to protect the navigation of the river, which was closed usually between November 20 and March 15, when the river was commonly frozen.

The specifications as originally prepared called for the erection of the draw-span by January 1, 1896, and the completion of the bridge by November 1, 1896. Subsequently such specifications were modified so as to fix March 1, 1896, as the date for the erection of the draw-span.

The company proceeded to fulfil the obligations of its contract and erected the necessary false work including that for the draw and was proceeding with the erection of the draw-span itself, when on February 25, 1896, as a result of a sudden rise in temperature, the ice in the river at that point moved, taking away with it the false work and a substantial portion of the draw-span then in place (11). In the condition in which the work was at that time, nothing could have been done to prevent this destruction. If the accident had not happened the draw-span would have been completed by

March 15 to such an extent that it could have been swung so as not to impede navigation (11), which actually opened that year on March 27 (12).

On February 26, 1896, as said company was about to resume work upon the draw-span in accordance with the terms of its contract, and had begun to replace the false work in the river, Colonel Buffington, the local representative of the United States in charge of the work, ordered it to desist and employ a lift-span so that there would be no obstruction to navigation should it open before the work of reconstructing the draw-span had been completed. This lift-span was a temporary span running from the draw rest to the first finished span, supported at each end by ropes attached to wooden towers and was raised and lowered by means of a stationary engine to admit the passage of boats and trains.

The company objected to this order of Colonel Buffington as not warranted by the written contract and because it would be subjected thereby to great expense. It also contended that it could repair the damage done by the accident and erect the draw-span upon false work across the channel of the river, as its contract required, prior to the opening of navigation. Colonel Buffington and his assistants maintained, however, that this could not be done, and insisted on a compliance with his said order.

The lift-span was furnished to the company and was erected and maintained by it under the instructions of the engineers of the United States until June 1, 1896, when the draw-span was ready to be swung. The expense of such erection and maintenance was $6,683.59, beyond what it would have cost the company to reconstruct the draw-span in the manner called for in its contract (10).

The Court of Claims found that the erection of the lift-span was necessary to provide not only for the railroad traffic across the bridge *but also for the navigation along the river*, and that it was the most feasible and least expensive method of so doing; that the navigation along the river at this point usually was heavy and continuous after it opened

and if it had in fact been interrupted to the date when the draw-span could have been completed ready to be swung, the damage to persons engaged in such navigation would have been greater than the expense of the erection and operation of such lift-span (12).

Upon the final completion of the bridge, the company was paid the sum of $12,935.40, the voucher therefor reciting that this amount was the final payment under said written contract (13). No part thereof covered any portion of the cost of erecting and maintaining said lift-span. Before he would deliver this voucher, Colonel Buffington compelled the representatives of the contracting company to execute the following receipt (12):

> "The receipt on the attached voucher for the last payment, viz., of twelve thousand nine hundred and thirty-five dollars and forty cents ($12,935.40), for the new superstructure and work of erection of same, and alterations and additions to the abutments and piers of the Rock Island Bridge between the 'Rock' Island and the city of Davenport, Iowa, under the contract with the United States dated October 2, 1895, is hereby acknowledged as the final and full payment for all the material furnished and for all the work performed under the said contract, and in full of all charges, claims, adjustments, differences, or other alleged indebtedness incident to the work or related to it in any manner whatever.
>
> "The Phœnix Bridge Co.,
> "By A. C. Stites, *Res. Eng.*
>
> "Rock Island Arsenal, Illinois,
> *December 11th* 1896."

The Court of Claims found that the company at the time of executing this paper, *made no protest* and understood that it covered all claims growing out of the *erection of said bridge* (16th Finding, pp. 12-13). The facts set forth in this finding, however, show that the company's representative *objected to signing* the receipt and only did so under

compulsion, after Colonel Buffington had threatened to withhold payment of the balance admittedly due under said written contract.

ASSIGNMENTS OF ERROR.

The Court of Claims erred in holding:

1. That the Phœnix Bridge Company was bound under its contract to protect the navigation of the river and to assume the burden of providing the temporary means deemed necessary by the officers of the United States to avoid its obstruction.

2. That under said contract said company assumed the burden of the accident of February 25, 1896, and was bound to so act as to keep down all damages that might result therefrom.

3. That said company was not entitled to recover the cost of erecting and maintaining the lift-span.

4. That in signing the receipt for the final payment due under said written contract, said company had released any claim which it might have had under an implied contract for the cost of erecting and maintaining said lift-span.

ARGUMENT AND AUTHORITIES.

For convenience the first, second and third assignments of error will be considered together.

I.

The company was not bound to protect the navigation of the river either by its contract or by law aside from its contract.

All of the important and material provisions of the contract and of the plans and specifications forming a part thereof, are set forth in the findings of the Court of Claims (8 and 9). The intention to provide for non-interference with the railroad traffic over the bridge is expressly manifested, the specifications under the head of "Erection" providing:

> "The contractor will be required to perform the work in such a manner as not to interfere with the running of the trains over the bridge. One track will be used until the erection is completed. The contractor will be required to keep this track continually open and safely supported, so as not to delay the trains. * * *
>
> "The contractor will be required to remove the old superstructure, without disturbing the trains, and to erect the new superstructure complete in every respect, including riveting, ready to receive the ties for the railway floor, the wooden roadway, and the moving machinery of the draw. * * *
>
> "The contractor will be required to effect this change of grade in a manner not to disturb the trains or introduce heavy inclines" (8 and 9).

The contractor was also required to make temporary provision for the highway traffic over the bridge (9).

But similar clauses obligating the contractor to protect the navigation of the river are conspicuous by their absence. The only provision in the specifications remotely suggesting it is that relating to the clearing up of the debris *after the work had been completed, to wit:*

> "The contractor shall remove all temporary work which he may put in the river so that there will be nothing left to interfere with the navigation or to catch drift. This temporary work shall be removed as soon as possible after its duty is done" (8).

These plans and specifications were prepared by the officers of the United States, and for that reason should be construed most strongly against the defendant. Had the Government officers desired to place upon the contracting company the burden of protecting the navigation of the river, is it not reasonable to assume that they would have done so by adding to the clause "the contractor will be required to perform the work in such a manner as not to interfere with the running of trains over the bridge," the additional words "or the passage of boats through the draw of said bridge"? And having failed to do so, can any such provision be read into the solemnly-executed agreement of the parties for the purpose of enforcing responsibility for an unexpected casualty subsequently occurring?

Applying a familiar rule of construction, the inclusion of the express provision concerning railroad traffic is internal evidence persuasively tending to establish an intention to exclude any obligation on the part of the contracting company to provide for the navigation of the river.

The officers of the United States undoubtedly realized that the insertion in the contract of such a provision with regard to navigation would have introduced an element of risk and possible liability for damages for which the contractor would have been justified in exacting increased compensation to cover insurance and other expenses. So in lieu of *protection by contract* for the shipping interests, they substi-

tuted *protection by closed season*, relying upon the previous history of the river and fixing a date for the completion of the draw-span, which was the only important span, prior to the time when navigation at that point usually opened. As the Court of Claims found, if the unexpected accident of February 25th had not intervened, the draw-span would have been completed before navigation opened in the year 1896.

The possible interruption of railroad traffic which was continuous throughout the year, was evidently regarded by the officers of the United States as of more consequence than the possible interruption of traffic along the river which was suspended for several months each winter, and the United States as the owner of the bridge and the representative of all parties interested in the traffic along and across the river, formulated the contract so as to protect the class most urgently in need of protection.

No pre-existing understanding of the parties as to the necessity for completing the draw-span by a certain day can create an obligation to respond in damages for a failure to complete it by that date if the terms of the written instrument subsequently executed do not expressly so provide. The contract itself is the formal and last expression of the agreement of the parties, and while contemporaneous "understandings" may be resorted to for the purpose of explaining ambiguous provisions, neither contemporaneous nor pre-existing understandings can be employed to create an obligation as to a specific matter in regard to which the instrument itself is silent.

The Court of Claims found that the draw-span was destroyed by a "sudden breaking up and movement of the winter ice" (10) and in its opinion described the accident as an "unforeseen event," "an act of God," which made it impossible to perform the contract (15).

This court has held that "if a party by his contract charge himself with an obligation possible to be performed,

he must make it good *unless his performance is rendered impossible by the act of God, the law, or the other party.*"

Gleason *v.* United States, 175 U. S., 588, 602.
Dermott *v.* Jones, 2 Wall., 1.

By act of God is meant the action of the elements of fire, wind, and water, and the shaking and upheaval of the earth—those phenomena of nature which man can neither create, control, nor prevent.

If, as the Court of Claims found, the draw would have been sufficiently completed so as not to interfere with navigation but for this sudden, unforeseen event and act of Providence, which, under the decisions just quoted, would have relieved the contracting company of the duty of performance within the time stipulated, and under the terms of its contract would have entitled it to an extension of time for finishing the work (7 and 8), and there is no express provision in the contract calling upon the company to keep open the navigable channel of the river,—how can it legally or equitably be held responsible for the cost of additional work to prevent interference with such navigation made necessary by this unavoidable accident?

It is not contended that the accident relieved the company of its contractual duty to complete the draw-span and erect the whole bridge in the manner required by the contract. This it was ready and willing and actually proceeding to do when it was prevented by the representative of the United States, Colonel Buffington. The company was bound to complete the bridge in the contractual method, but not in an entirely different and more expensive way to meet a possible emergency—the early opening of navigation—for which the contract failed to provide.

Under this contract, if the navigation of the river had opened unusually early in 1896, say on February 1st, would the company have been obliged to remove its false work and

change the contractual method of constructing the draw, or by failing to do so, have made itself liable to the shipping interests? The question seems to us to carry its own answer in the negative. If no such obligation could have arisen under such circumstances on February 1st, how could the happening of an unforeseen casualty fifteen days later alter or modify the company's contractual obligations?

If there was no obligation imposed on the company to protect the navigation of the river by its contract, we submit that there was none imposed by law irrespective of the contract. In reconstructing this bridge the company was acting as the agent of the United States, which was clothed with the most ample if not the sole authority to make such an improvement. The United States was performing a duty with respect to one great highway of interstate commerce—the railroad connecting two great sections of the country—and in so doing had the fullest power to temporarily obstruct and burden another highway of interstate commerce—the navigable channel of the Mississippi river. Any private inconvenience which might have arisen from such a work of internal and public improvement would have given no cause of action against the United States or against any one duly authorized to act for it in such an undertaking. This principle is so well established that its discussion would seem to be unnecessary.

Rhea *v.* Railroad Co., 50 Fed. Rep., 16, 23.
Levy *v.* United States, 177 U. S., 621.
Bridge Co. *v.* Hatch, 125 U. S., 1.
Cardwell *v.* Bridge Co., 113 U. S., 205.
Scranton *v.* Wheeler, 179 U. S., 141.
Bedford *v.* United States, 192 U. S., 217.
Cooke, Commerce Clause of Fed. Constitution, §52, p. 106.

In Rhea *v.* Railroad Company, *supra*, the court held:

> "The bridge, as originally constructed, and after being restored in June, 1890, was not an unlawful

interference with navigation. The method employed to restore or rebuild it was not an unreasonable obstruction or interruption of navigation, under the authority lawfully conferred to build and maintain it. The line of road of which it formed an essential part was and is both a state and national highway, just as the Cumberland river is. The traffic over the road, as reported by the master, exceeds that on the river. The public convenience and benefit were subserved by the mode of rebuilding the bridge which defendant adopted. In rebuilding its bridge, in pursuance of authority conferred by law for the benefit of the public, and without unreasonably or unnecessarily obstructing navigation of the river, it cannot be held that defendant created a public nuisance such as will entitle complainant to recover of it the special damages which they claim to have sustained. This conclusion is clearly and fully supported by the cases of Transportation Co. *v.* Chicago, 99 U. S., 635; Hamilton *v.* Railroad Co., 119 U. S., 280-285; 7 Sup. Ct. Rep., 206; and Green & B. R. Nav. Co. *v.* Chesapeake, O. & S. W. R. Co., 88 Ky., 1-12; 10 S. W. Rep., 6."

And in a very recent work on this subject, it is said:

"The power to prevent obstructions to navigation, already considered, includes the power to regulate the construction of bridges. But the authority of Congress to itself authorize the construction of a bridge as a means of communication seems to rest on a somewhat different basis, that is to say, upon the power just considered to authorize the establishment and maintenance of means of commercial communication. This is certainly so as to a bridge connecting points in different States, and it seems equally clear as to a bridge connecting points in the same State, but used, for instance, as a portion of a line of railroad connecting points in different States. It follows that the obstruction to navigation caused by a bridge thus authorized 'must be deemed to be a burden lawfully imposed upon the free navigation of the river, of which no one can legally complain.'"

Cooke, Commerce Clause of Fed. Constitution, §52, page 106.

If this be so, *a fortiori*, no right of action could have been predicated upon an obstruction of navigation caused by an act of God.

U. S. *v.* Gleason, 175 U. S., 588, 602.

The contract provided that if any default should be made in delivering the work mentioned therein of the quality and at the times and places specified, nothing therein contained should prevent the Chief of Ordnance, upon the happening of any such default, from declaring the contract at an end, "but that in case of overwhelming and unforeseen accident by fire or otherwise, the circumstances shall be taken into equitable consideration by the United States before claiming forfeiture" etc. (7 and 8).

If the company was not liable either by the express terms of its contract or by law irrespective of contract to protect the navigation of the river and make good any damages caused by an obstruction thereto, is it equitable to throw upon it the whole burden of defraying the cost of additional work of which the United States and the shipping interests it represented have received the sole benefit and which was made necessary by the happening of an overwhelming and unforeseen accident which the company had no part in causing?

By replacing the false work in the river and completing the draw-span in the manner required by the plans and specifications, the company would have been able to have finished the bridge without causing any interruption to the railroad and highway traffic over the bridge. The sole reason for adopting the lift-span was to prevent interference with navigation if it opened at an early date, an emergency for which the written contract had failed to provide. The erection of this span was entirely independent of the contract and in addition to the work required therein. The United States was the party ordering it and, as the owner of the bridge and

the representative of the shipping interests received the benefit of the claimant's labor and material and should pay the reasonable value thereof found by the Court of Claims.

There is an implied contract to pay for extra and additional material and work not called for by the original contract.

Grant's Case, 5 C. Cls., R., 72.

Wood *v.* Ft. Wayne, &c., R. R. Co., 119 U. S., 312.

Where the alterations in or additions to a contract were ordered by an officer clothed with responsibility and authority to contract, a contract will be implied to the extent of the benefit which the defendants have received and the claimant will be entitled to recover in a *quantum meruit*.

Hawkins *v.* United States, 96 U. S., 689.

Barlow *v.* United States, 35 C. Cls. R., 514, 547-548.

Where a parol contract has been wholly or partly executed on one side, the party performing will be entitled to recover the fair value of his property or services as upon an implied contract for a *quantum meruit*.

Clark *v.* United States, 95 U. S., 539.

The invalidity of a contract by reason of the failure to comply with section 3744, Revised Statutes of the United States, requiring it to be in writing and signed by the contracting parties, is immaterial if the contract has been performed.

St. Louis Hay Co. *v.* United States, 191 U. S., 159.

II.

The receipt given by the company for the final payment under its contract was not a release of its claim for additional work and material furnished for the erection of the lift-span.

The paper plainly recites that it is a *receipt* for the *final* and *full payment* for the material furnished and work performed *under said contract*, and the amount of the payment is expressly mentioned (12-13). It nowhere states that it is a *release* of claims, demands and causes of action *arising under the contract or otherwise*. It is not under seal and consequently imports no consideration. The payment of money due on one contract or the relinquishment of possible claims for delays which might have been if properly found to be defaults, a good set-off against such payment cannot be a valid consideration for the release of a claim for reimbursement under an entirely separate and independent contract based upon an implied promise to pay for work done and materials furnished to meet an emergency for which the written contract did not provide. If the United States itself had erected and operated the lift-span, or had employed another contractor to do so, could it be fairly contended that it might set off the expense thereof in reduction of the amount due this company under its written contract for building the whole bridge?

> "An agreement to abandon a claim is a mere *nudum pactum*. Thus, if there be an ascertained and admitted debt due and the debtor agrees to pay one half of the debt upon receiving a discharge in full, and the creditor accordingly gives a written acknowledgment of the receipt of the money in full of all demands, this will not discharge the remaining moiety of the debt, *unless the acknowledgment is under seal*, or some valid consideration has been given and received for the discharge."
>
> 3 Addison on Contracts, *p. 1221.

A receipt in full of all demands does not necessarily amount to a release.

3 Addison on Contracts, *p. 1223.

Lee *v.* Lancashire & Yorkshire Ry. Co., L. R., 6 Ch., 537.

"A release *not under seal* is not a technical bar even in a suit at law."

Oelrichs *v.* Spain, 15 Wall., 211.

This court, in the case of the United States *v.* Cramp Co. (206 U. S., 118), held that no payment of extra money was necessary to sustain the release in that case because *it was under seal and of itself was full consideration*. There, however, the release was not only solemnly executed under the corporate seal of the company, but it contained the apt legal phraseology always employed in a release—"remise release and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity." In the case at bar, the absence of such language is as noticeable as the absence of a seal.

As this paper was prepared by the officers of the United States, and only signed by the company after objection and under duress, any ambiguous language therein should be construed most strongly against the party attempting to give the paper a meaning not plainly expressed. Furthermore, as it imports no consideration in fact, the existence of a consideration, if any, should have been proved by the United States. There is no such proof in the record. On the contrary, the voucher for $12,935.40, which forms the sole consideration for this receipt and alleged release, has written upon its face "final payment—under formal written contract dated October 2, 1895," clearly showing that it was not intended as a payment for any work done or materials furnished by the contractor pursuant to any other contract or agreement, express or implied, than the one specifically mentioned.

The consolidated memorandum and receipt is upon its face an incongruous whole, in which the certificate of correctness as to the *amount* of the account is not true if that amount was in part employed to satisfy other claims, as stated by the memorandum, and the whole paper results apparently in recording *an overpayment upon one matter*, besides *a use of public funds for another matter which lacked due approval*.

However, as this may be a mere irregularity which the United States can waive, it is to be admitted that the latter, for the purpose of showing *consideration*, here or there, can have the benefit of all the facts in the transaction, whether shown orally or not. For instance, the memorandum does not either mention or presume as a consideration for *its admission* that the receipt had a business meaning other than that conveyed upon its face. Such admission, *taken simply*, is no doubt competent evidence against the party that made it—"evidence" that is subject to contradiction; but if it be contended that the admission by the memorandum was made *upon a consideration*, and therefore cannot be contravened, and constitutes *an accord and satisfaction* betwixt the parties, it is plain that it devolves upon the United States to show that consideration—*i. e.*, that it is necessary for the party who introduced it to show its validity as to every particular purpose for which it may be offered. If the United States relies upon its own waiver of "penalties" as constituting the consideration for which the claimant withdrew its account for additional work, it must show the existence of such penalties on December 11, 1896, when the memorandum was entered upon the voucher.

And, again, if the United States relies upon its *waiver of the threatened withholding* of the $12,935.40 as consideration, it must show the validity of such waiver *for this purpose*. A recent case whose features are very like those of the present is McCarthy *v.* Hampton, 61 Iowa, 287, where a man whilst performing work under a contract with specifications was

threatened by his employer that unless he gave a new guaranty about the work it would be stopped, and therefore without farther consideration gave it, and the work went on. Subsequently, after failure of the guarantor, it was held that this guaranty had never been binding, for want of consideration, and the guarantor recovered for the work.

Here, therefore, in like manner the waiver of a threat to withhold payment of a sum due was no consideration for a fresh engagement, viz., surrender of a claim upon the party who had so threatened: and therefore the memorandum in question carries the defense no farther in respect to the existence of penalties than this defense had proceeded otherwise. If it appears upon the face of the record, otherwise than by the *memorandum*, that the claimant is indebted to the United States in penalties sufficient to offset the claim, that, of course, is a full defense; but if this does not so appear *otherwise*, the *memorandum* will not help, for there is no *presumption* of *consideration* therefor; there was no mutual *waiver* of "differences," etc., therein, and the waiver of a threatened withholding of the $12,935.40 was not *valid* as a consideration. So that it devolved upon the United States *in that connection, as much as otherwise*, to show the existence of an amount of *penalties* or other debt sufficient to defeat the claim of $6,683.59.

And we beg to insist that in order for a sum of money to be chargeable as proceeds of a "forfeiture" under the contract, action to that end *by the special tribunal employed therefor is a sine qua non:* while all of that sort of action shown here, whether expressed or by presumption, is based upon alleged neglect of work upon the *draw-span before February* 25, 1896 (*ante*): whereas under the contract none of the things which had befallen that span *during* that period had been of a nature to warrant forfeiture, especially "forfeiture" first *declared* after a series of business details contradictory thereto and proceeding from both parties up

to December 11, 1896, the date of *the constrained execution of the memorandum*, which *memorandum* is the only matter that the defense suggests as importing such declaration.

It is respectfully submitted that the judgment of the Court of Claims was erroneous and should be reversed, and the cause remanded to that court with a direction to enter judgment in favor of the appellant for the amount claimed.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
Attorneys for Appellant.

Office-Supreme Court, U. S.
FILED
NOV 14 1910
JAMES H. McKENNEY,
Clerk.

No. 24.

In the Supreme Court of the United States.

October Term, 1910.

THE PENNOYER-DIXON COMPANY, APPELLANT,

vs.

THE [illegible]

[illegible]

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE PHOENIX BRIDGE COMPANY, appellant,
v.
THE UNITED STATES. } No. 26.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On October 2, 1895, the appellant, the Phoenix Bridge Company, contracted with the duly authorized representatives of the United States to rebuild the government bridge across the Mississippi River connecting Davenport, Iowa, and Rock Island, Ill. In the execution of the contract and in the supervision of its performance the United States was represented locally by A. R. Buffington, colonel of ordnance, United States Army. The contract was duly approved by D. W. Flagler, brigadier-general, Chief of Ordnance, acting under the direction and authority of the Secretary of War. The contract provided that

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the work should be performed in such manner as not to interfere with the running of trains over the bridge to the extent that the contractor was required to keep one track continually open and safely supported so as not to delay trains. The contract further provided for the erection of stationary spans and *one draw span*, whereby vessels and other craft on the river could pass from one side of the bridge to the other, and, as subsequently modified, fixed March 1, 1896, as the date for the erection of the draw span and September 15, 1896, for the final completion of the whole work. The material part of the contract to be considered may be found on pages 7 to 9, inclusive, of the record. On February 25, 1896, there was a sudden breaking and movement of the ice in the river at the point in question, and as a result thereof the draw span, so far as it had been constructed, was destroyed. On the following day, to wit, the 26th of February, 1896, as the appellant company prepared to replace the false work in the river for the purpose of rebuilding the draw span, Colonel Buffington ordered that a temporary *lift span* be built, so that there might be no obstruction to navigation should navigation open before the work of reconstructing the draw span had been completed; said temporary lift span to be attached to the first finished span and to be raised and lowered by means of a stationary engine which would permit the passage of boats and trains. The appellant company objected to the building of a temporary lift span on the ground that no such requirement was provided in the contract. Colonel

Buffington insisted that the most feasible way of providing for railroad traffic and for the passage of boats during the erection of the draw span was to put in place the temporary lift span, and thereupon the appellant company erected said temporary lift span at the expense of $6,683.59, for which amount it claims judgment. Upon the completion of the contract the appellant company signed a receipt attached to the voucher for the last payment, acknowledging full payment for all the material furnished and all the work performed under its contract, and for all charges, claims, adjustments, differences, or other alleged indebtedness incident to the work or related to it in any manner whatever. (See Rec., p. 12.)

The material facts in the case as found by the Court of Claims are in substance and effect as follows:

1. That all the work should be done "according to plans and specifications furnished or approved by the commanding officer Rock Island Arsenal," and the same was performed under the supervision of A. R. Buffington, colonel of ordnance, who represented the United States locally. (Rec., 7.)

2. The plans and specifications provided for a draw span (Rec., 9), which "was intended for the convenience of navigation upon the river" and without which navigation would be obstructed. (Rec., 10.)

3. The appellant, by the terms of the contract, agreed to finish the draw span by March 1, 1896, and

complete the bridge by September 15, 1896. (Rec., 9.)

4. The draw span was not finished "ready to swing" until June 1, 1896 (Rec., 12), and the bridge was not completed until "several months later than the day limited in the contract." (Rec., 13.)

5. The dates fixed for the finishing of the draw span and for the completion of the bridge were "of the essence of the contract," and for each day of delay appellant was required to pay defendant, as liquidated damages, the sum of $200. (Rec., 9.)

6. In the fulfillment of the contract by appellant the defendant was not responsible for any delay. (Rec., 11.)

7. The bridge was to take the place of an old one at the same place, upon which there were railroad tracks, and it was stipulated in the contract that during the construction of the new structure there should be no interruption to railroad traffic. (Rec., 11.)

8. The draw span was to be constructed at a time and in such manner as not to interfere with navigation. (Rec., 5, 10.)

9. The plan adopted to construct the bridge so that railroad traffic should not be interrupted was to erect "false work consisting of timbers extending from the bed of the stream to the old superstructure," which false work when constructed "rendered navigation impossible." (Rec., 11.)

10. That navigation closed each year about November 20 and remained closed until about March 1. (Rec., 5, 10.)

11. The appellant began the erection of the draw span after navigation had closed in the year 1895, and had partially completed the same by February 25, 1896, and barring accidents could have completed it, to an extent as not to impede navigation, by March 15, 1896. (Rec., 11.)

12. On February 25, 1896, there was a rise in temperature which caused a sudden movement of the ice in the river, resulting in the destruction of a substantial part of the unfinished draw span, together with the false work. At that time conditions were such that the work destroyed could not have been saved. (Rec., 11.)

13. Immediately after the destruction mentioned there was a conference between Colonel Buffington and his assistants and the representatives of the appellant to consider the best means whereby the repair of the damage mentioned could be made and not interfere with railroad traffic, or obstruct navigation, "which was likely to open any time after March 1." (Rec., 11.) As a result of this conference Colonel Buffington was of the opinion that the draw span could not be finished prior to the time navigation would open if the same were erected by the construction of new false work, and decided that the most feasible way to proceed with the erection of the draw span in

order that there might be no interruption to navigation or railroad traffic was to construct a temporary *lift* span, and accordingly ordered appellant not to replace the false work in the space to be occupied by the draw span, but to provide a temporary lift span. (Rec., 11.)

14. The representatives of appellant believed that the draw span could be erected on false work so as to be completed "prior to the opening of navigation" (Rec., 12), and they objected to constructing a lift span "upon the ground that it was not warranted by the contract" and would be an additional expense to appellant. (Rec., 10.)

15. Appellant complied with the order of Colonel Buffington and constructed a temporary lift span and maintained the same until June 1, 1896, at the cost of $6,683.59. The erection of the lift span was necessary to provide for railroad traffic and the navigation of the river and was the most feasible and the least expensive method of so doing. (Rec., p. 12.)

16. In 1896 navigation opened March 27. Had navigation been interrupted between March 27 and June 1, 1896, when the draw span was finished and ready to swing, the damage to persons engaged in such navigation would have been greater than the expense of the erection and operation of said lift span. (Rec., p. 12, finding 13.)

17. Prior to the completion of the work and before December 11, 1896, there had been dispute between the parties to the contract as to the liability of

defendant to appellant for the cost of the lift span and of the appellant to defendant for alleged delays. (Rec., p. 13.)

18. On December 11, 1896, all the work contemplated by the contract had been completed and appellant on said date received from the United States as final payment the sum of $12,935.40, and acknowledged in writing receipt of the same as the final and full payment for all the material furnished and for all the work performed under the contract and in full for all charges, claims, adjustments, differences, or other alleged indebtedness incident to the work or relating to it in any manner whatever. The defendant at the same time waived any and all claims it had against appellant by reason of its delay in the completion of the work. (Rec., 12, 13.)

II.

DEFENDANTS' CONTENTIONS.

From the facts as found by the Court of Claims defendants contend that no recovery can be predicated upon them because—

First. There was an accord and satisfaction of the claim involved.

Second. Under the contract it was the duty of appellant to construct the lift span in question.

Third. Appellant has not been damaged.

III.

ARGUMENT.

ACCORD AND SATISFACTION.

An ascertained, liquidated, undisputed, overdue account is not discharged by the payment by the debtor to the creditor of a sum less than demanded, even though the latter agrees to receive the sum in full satisfaction. Such has been the rule of the common law since the decision in *Pinnel's case* (3 Coke's Reports), and has been generally followed since then by the courts of England and of this country, although its "reasonableness, justness, fairness, or honesty" has been criticised and condemned "in almost numberless instances" in the courts of both countries. See *Jaffray* v. *Davis* (24 N. Y., 164–167; S. C., 11; L. R. A., 710, 712).

But this rule does not apply to accounts not due, not liquidated, uncertain, or in dispute. In such class of cases if the creditor, with full knowledge of his rights, voluntarily agrees to accept from his debtor a less sum than he claims, and actually receives a less sum from the debtor, the debt is discharged or satisfied, and the creditor is thereafter estopped from any further assertion of the demand. (*Baird* v. *United States*, 96 U. S., 430, 431; *Mason* v. *United States*, 17 Wall., 67, 74; *Sweeny* v. *United States*, id., 75, 78; *Savage, exr.*, v. *United States*, 92 U. S., 382, 386; *United States* v. *Wm. Cramp & Sons Co.*, 206 U. S., 118, 126–128; *Burrill* v. *Crossman*, 91 Fed. Rep., 543, 544; *Allison et al* v. *Alendroth*, 108

N. Y., 470, 472; *Jaffray* v. *Davis, supra; Fuller* v. *Kemp*, 138 N. Y., 231, 237; *Hurrle Glass Company* v. *Hooker Company*, 120 Ill. App., 433, 434.) In other words, when there has been an accord, which is an agreement to receive, and a satisfaction which is the actual reception, the claim is settled and there can be no further controversy in the courts in respect thereto.

To constitute a good accord and satisfaction there must be "an agreement to accept part of an unliquidated and disputed demand in full satisfaction of the whole demand, executed by the payment of the sum agreed upon." (*Burrill* v. *Crossman, supra*, 544.)

It is a good accord and satisfaction, however, "where there is an independent consideration, or a creditor receives any benefit, or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement." (*Allison et al.* v. *Abendroth, supra*, 472.)

From the authorities upon the subject it may be deduced that it is a good accord and satisfaction "if the debtor, in addition to the agreement to pay any part of the debt, gives the creditor anything which in judgment of law can be considered a benefit, and the creditor accepts it in satisfaction of the liability." See note to *Jaffray* v. *Davis* (11 L. R. A., p. 711.) And when parties to the controversy, each having full knowledge of the facts, and without legal compulsion, meet and settle a disputed account, an accord and satisfaction result, and the transactions

involved in such settlement are deemed merged therein and not subject to be reopened by either party. (*Hurrle Glass Co.* v. *Hooker Co., supra.*)

The determining question is "whether the payment was in fact made and accepted in satisfaction." (*Baird* v. *United States, supra*, 431.)

The rule in regard to accord and satisfaction applies with the same force and effect to controversies in respect to claims between the Government and individuals as it does to controversies between individuals. (*Sweeny* v. *United States, supra; Savage* v. *United States; United States* v. *Wm. Cramp & Sons Co., supra.*)

In the Sweeny case, Mr. Justice Clifford, speaking for the court (p. 77), said:

> Claims against the United States which are disputed by the officers authorized to adjust such accounts may be compromised, and if the claimant voluntarily enters into such a compromise and accepts a smaller sum than the claim and executes a discharge in full for the whole claim he is bound by the adjustment and can not sue for what he voluntarily relinquished.

In rendering the opinion of the court in *Savage, exex.*, v. *United States, supra*, at pages 388 and 389, Justice Clifford uses the following language:

> Parties having claims against the United States, which are disputed by the officers authorized to adjust the same, may compromise the claim, and may accept payment in a different medium from that promised or may

> accept a smaller sum than that claimed; and where it appears that the claimant voluntarily entered into a compromise and accepted payment in full in a different medium from that promised or accepted a smaller sum than that claimed and executed a discharge in full for the whole claim, or voluntarily surrendered to the proper officer the evidences of the claim for cancellation, he can not subsequently sue the United States and recover in the Court of Claims for any part of the claim voluntarily relinquished in the compromise. (*Sweeny* v. *United States*, 17 Wall., 77; *United States* v. *Child*, 12 id., 244; *United States* v. *Justice*, 14 id., 549.)
>
> Decisions of the kind by this court are quite numerous, and they show beyond all doubt that parties may adjust their own controversies in their own way, and that when they do so voluntarily and with a full knowledge of their rights and all the circumstances no appeal lies to the courts to review their mutual decision. Courts can not make contracts for parties; and if parties understandingly contract to adjust a controversy between them in a particular way and actually execute the contract they are both bound to regard the controversy as at an end.

The fundamental distinction between the two rules is that in the case of an overdue, ascertained, undisputed demand, the agreement to accept a less sum than claimed is not based upon a good and sufficient consideration, while in the case of a demand not due or unliquidated or disputed, the agreement to receive

a sum less than demanded is based upon a good consideration. In cases of the first class named, in judgment of law, the creditor receives no benefit, nor is he placed in any better position, nor has the debtor been harmed or placed in a less advantageous position, while in the latter class of cases, in judgment of law, the creditor has been benefited, and the position of the debtor has been changed to his disadvantage. The latter has parted with money which he believed he had a right to retain, while the former has, at the expense of the latter, been furnished with a weapon to harass and assail him.

Furthermore, the courts encourage the settlement of unliquidated and disputed accounts between the parties themselves and without resort to legal procedure (*Fuller* v. *Kemp*, *supra*, 237), and when the differences with reference to such accounts are adjusted by the parties "voluntarily and understandingly no appeal lies to the courts to review their mutual decision." (*Sweeny* v. *United States*, *supra*, 78; *Savage*, *etc.*, v. *United States*, *supra*, 388.) But should an appeal be made to the courts by one of the parties to the agreement or contract of settlement, it seems that the courts seize with avidity upon any consideration to support the agreement whereby the lesser sum was accepted in satisfaction of the larger; or, in other words, to extract, if possible, from the circumstances of each settlement or adjustment of unliquidated or disputed accounts a consideration for the new agreement and to substitute the new

agreement in place of the old, and thus to form a defense to an action brought upon the original contract. (*Jaffray* v. *Davis*, 124 N. Y. and 11 L. R. A., 713.)

In speaking for the court in the case of *United States* v. *William Cramp & Sons Co.*, *supra* (p. 128), Mr. Justice Brewer said:

> Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction. * * * If parties intend to leave some things open and unsettled, their intent to do so should be made manifest.

In the case at bar we find all the elements recognized in law necessary to constitute an accord and satisfaction. There was an unadjusted, unliquidated account; there was a *bona fide* disagreement in regard to the extent of the liability of each party; there was a controversy between them as to the amount due to appellant from defendant, if any. The United States had a counterclaim against appellant company in the nature of exacting the terms of the contract whereby the claimant should become liable to the Government for $200 a day as liquidated damages for each day the work was not completed beyond the contract period. This claim the Government waived in consideration that appellant should receive in full payment a less sum than it demanded. Therefore the acceptance of the last payment by appellant company and giving its receipt in full of all charges, claims, and differences against the Government found its consideration to support the agreement

and release in the waiver of claim for liquidated damages on the part of the United States. The sum offered by the government officials in full settlement of all differences between the parties to the contract was received by the appellant, and it in turn gave to the United States its receipt in full. It signed and delivered the same by its duly authorized representative voluntarily, freely, and with full knowledge of its rights in the premises. No coercion, no duress, no compulsion were used. Appellant was given the opportunity to accept the sum offered or to refuse it, and in determining its choice it voluntarily decided to release the Government from all claims incident to the work in question. By such election it gained an advantage over the Government and still retains the benefits it has received. It has not returned the money received from the Government, neither has it offered to make reparation or return thereof. It has not placed the defendant in the position it occupied prior to the date of settlement, neither has it offered or made any effort so to do. Therefore, having accepted and retained the money which was tendered by the Government as a compromise and settlement of all differences arising between the parties by reason of the contract and the work in question, we respectfully submit that appellant is now estopped from recovering a greater sum than the amount already paid. (*Hurrle Glass Co.* v. *Hooker Co.*, *supra*, p. 434; *Fuller* v. *Kemp*, 108 N. Y., 237; *United States* v. *Cramp & Co.*, *supra*.)

UNDER THE GENERAL TERMS OF THE CONTRACT APPELLANT WAS OBLIGATED TO CONSTRUCT THE LIFT SPAN.

Appellant's letter, dated August 10, 1895, to Col. A. R. Buffington (Rec., p. 5), and which letter is a part of the contract, expressly states that the work should be done during the season when navigation is closed. Furthermore, the court below has found:

> The object of fixing March 1, 1896, for the completion of the draw span was that navigation, which was likely to open at that place in the middle of March, should not be interrupted by the work of construction upon the bridge. This object was well understood by both parties to the contract. (See Finding IX, Rec., p. 10.)

In addition to this the contractor was required to perform the work in such manner as not to interfere with the running of trains over the bridge (see paragraph 143, contract, Rec., p. 8), and the work was to be performed in all respects under the supervision and in accordance with the plans and specifications furnished or approved by the commanding officer. (Rec., p. 8.)

The court has found that it was the decision of Colonel Buffington, who was in charge of the construction, that—

> The most feasible way of providing for railroad traffic during the erection of said draw span was to put in place a temporary lift span which could be so operated as to allow the passage of vessels. (Finding XI, Rec., p. 11.)

In Finding XIV (Rec., p. 12) the court uses the following language:

> The erection of the lift span was necessary in order to provide for railroad traffic and the navigation on the river, and was the most feasible and the least expensive method of so doing.

It may be seen, therefore, that the contractor was obligated to construct the lift span in order to carry out the spirit and intent of the contract to the effect that railroad traffic and navigation should not be interrupted.

The execution of the contract, that is, the performance of the work, was under the direct supervision of the Government's agent. It was his duty to see that the work was performed by such methods and in such manner as not to interfere with either railroad traffic or river navigation. The question in respect to the best method of performing the work necessary to prevent obstruction to railroad traffic and navigation is one of fact, and the determination thereof certainly rested with the defendant. But had the contract been impressively silent with respect to defendant being charged with the responsibility of determining the best method for the erection of the draw span after the accident, whereby traffic over the bridge and on the river would not be interrupted, the defendant would, of necessity, be obligated to assume such responsibility. It is the duty of the Government under the power conferred by the Constitution to regulate commerce among the

States; hence it is obligated to prevent any obstruction to the navigable capacity of the rivers. Therefore, the Government, by its agent, Colonel Buffington, determined as a fact that the best method of erecting that part of the bridge described as the draw span so as not to interfere with navigation and with railroad traffic was to construct a temporary lift span, and the court below found that the lift span was necessary for the purposes indicated.

Appellant has not claimed that Colonel Buffington did not exercise an honest judgment in arriving at his decision and no appeal was taken to his superior officers; neither did appellant file a protest against said decision with the Secretary of War. We therefore submit that the decision of Colonel Buffington is final and conclusive. (See *Hawkins* v. *United States*, 96 U. S. R., 689, 696.)

While it is true that the determination of the question finally rested with Colonel Buffington, yet he took the precaution, as shown by Finding XI, to consult with several of his assistants, and it was the consensus of opinion that the erection of the lift span was necessary, and, after investigating all the facts, the court found in favor of Colonel Buffington's decision, as set forth in said Finding XIV.

The method proposed by appellant for the construction of the draw span was to erect the same upon false work. (Finding XII, Rec., p. 12.) The Court of Claims, however, has found that such method would

have rendered navigation impossible. (Finding IX, Rec., p. 11.) If the erection of the false work would have rendered navigation impossible, then the construction of the draw span by such method would not only have been in violation of the provisions of the contract, but, in addition thereto, would have been in violation of that provision of section 10 of the act of September 19, 1890, which reads as follows:

> That the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. (26 Stat. L., p. 454.)

The foregoing provision, with some changes, has been incorporated in section 10 of the act of March 3, 1899, and as so incorporated reads as follows:

> That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited. (30 Stat. L., p. 1151.)

It may be contended by the learned counsel for appellant that the erection of the bridge having been authorized, appellant was thereby "affirmatively authorized by law" to obstruct the navigable capacity of the river during the time the work of constructing the bridge was being performed, and that under the act of July 13, 1892 (27 Stat., p. 110), the Secretary of War could grant appellant permission to so obstruct the river, and, further, that by its execution of the contract in question such permission was in fact granted to appellant. It is possible that if it became

necessary to obstruct the navigable capacity of the river by the erection of false work in order to build the draw span there might be some force in the view suggested; but the record shows that no such necessity existed and in the absence of such necessity we contend that appellant could not legally obstruct the navigable capacity of the river even with the consent of the Government, without the consent of the State or States that own the bed of the river where it was proposed to place the obstruction.

This court has held in effect that: "Under existing enactments the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State is not complete and absolute without the concurrent or joint assent of both Federal Government and State government." See *Cummings* v. *Chicago*, 188 U. S. R., 410; *Montgomery* v. *Portland*, 190 U. S., 89 (syllabus).

The title to the bed of the river at the point where the Rock Island bridge was constructed is not in the General Government. The State of Illinois has full jurisdiction over the bed of that stream from the eastern shore line thereof to the center of the stream, and the State of Iowa has full jurisdiction over the bed from the western shore line to the center of the stream. (*Kansas* v. *Colorado*, 206 U. S., 46–93; *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S., p. 447.)

However, the power of the General Government temporarily to obstruct the navigable capacity of a river for a public purpose without the consent of the

State which owns the river bed does not arise in this case, and such question need not be considered. Our contention is that a private party has not the right under existing statutes to temporarily impede navigation without the joint assent of the State which owns the bed of the river and of the National Government. It is the duty of the National Government to prevent private parties from placing obstructions in navigable streams, and unless a great public necessity demands it we contend that under existing statutes plenary power to authorize a private party to place temporary obstructions therein is not possessed by the General Government. (*Cummings* v. *Chicago, supra; Montgomery* v. *Portland, supra.*)

The record in the case at bar, including the findings of the court below, clearly and definitely sets forth the prominent fact that there was no necessity for appellant to obstruct or interfere with navigation in the performance of the work required by the contract. Furthermore, it is just as clearly and definitely apparent that appellant understood and fully recognized that such necessity did not exist, and in the execution of its contract navigation of the Mississippi River at the point in question was not to be interrupted. In making its bid to perform the work in question appellant recognized that there was no necessity for any interruption of navigation.

APPELLANT HAS NOT BEEN DAMAGED.

If we were to concede that appellant should have been permitted to erect the draw span by means of

the false work and that the order to erect the lift span was in violation of the contract, still we contend that no recovery can be made, for the reason that appellant has not been damaged.

The Court of Claims has found as a fact that the cost of the erection, operating, and maintaining the lift span during the time of the construction of the draw span between February 25 and June 1, 1896, was the sum of $6,683.59. (Rec., p. 10.) The court further found that had navigation been interrupted in the spring of 1896 up to the date when the draw span could have been ready to swing the damage to persons engaged in such navigation would have been greater than the expense of the erection and operation of the lift span. (Rec., p. 12.) Manifestly, under the facts in this case as determined by the court below, appellant would have been liable for this damage, especially in view of the fact that no necessity has been shown for an obstruction to the navigable capacity of the stream during the time the work was in progress.

We respectfully submit that no error appears, and therefore the judgment entered by the court below, dismissing the petition, should be affirmed.

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A. C. CAMPBELL,
Attorney.

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